SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-250

WILLIAM BATES COLE, JR.,

Petitioner,

vs.

WILLIAM T. CLEMENTS, JR., et al.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. Interpretation Of Air Force Regulation 35-24 By The Court Of Appeals To Deny Petitioner A Copy Of An Adverse Report Constitutes A Denial Of Due Process And Creates A Conflict With The Decisions Of Other Courts Of Appeals And Prior Decisions Of This Court	6
2. The Court Of Appeals Erroneously Applied The "Basis-In-Fact" Standard In Upholding The Air Force's Denial Of The Petitioner's Application For Discharge As A Conscientious Objector	11
CONCLUSION	14
APPENDIX	15
1. Opinion And Order Of Court Of Appeals	25
2. Order Denying Rehearing By Court Of Appeals	25
3. Order Of The District Court For The District Of Colorado	26
4. Decision Of The Air Force Chief Of Staff	29

TABLE OF AUTHORITIES CITED

CASES:

Bates v. Commander, 417 F.2d 475 (1st Cir. 1969) ..12, 13

Bohmert v. Faulkner, 438 F.2d 747 (6th Cir. 1971) 12, 13

Bouthillette v. Commanding Officer, 318 F. Supp. 1143 (D.R.I. 1970) 14

Page

Chernekoff v. U.S., 219 F.2d 721 (9th Cir. 1955) 8
Clay v. United States, 403 U.S. 698 (1971) 13
Cohen v. Laird, 315 F. Supp. 1235 (D.S.C. 1970) 13
Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971) 8, 10
Dickinson v. United States, 346 U.S. 389 (1953) 12, 13
Ehlert v. United States, 402 U.S. 99 (1971) 10
Emerson v. McKean, 322 F. Supp. 231 (D. Ark. 1971) 13
Friedberg v. Resor, 343 F.2d 935 (2nd Cir. 1971) 8
Gonzales v. United States, 348 U.S. 407 (1955) 7, 9, 10
Goodwin v. Laird, 317 F. Supp. 863 (N.D. Cal. 1970).... 13
Helwick v. Laird, 438 F.2d 959 (5th Cir. 1971) 12
Kessler v. United States, 406 F.2d 151 (5th Cir. 1969) 12
McGarva v. United States, 406 U.S. 953 (1972) 10
O'Mara v. Zebrowski, 447 F.2d 1085 (3rd Cir. 1971).... 8
Ptak v. Laird, 335 F. Supp 727 (D. Colo. 1971) 14
Rastin v. Laird, 445 F.2d 645 (9th Cir. 1971) 12
Rothfuss v. Resor, 443 F.2d 554 (5th Cir. 1971) 12
Sicurella v. United States, 348 U.S. 385 (1954) 13
Simmons v. United States, 348 U.S. 397 (1955) 7, 9
Smith v. Laird, 485 F.2d 307 (10th Cir. 1973) 11, 12
United States v. Abbot, 425 F.2d 910 (8th Cir. 1970) 12, 13
United States v. Cabbage, 430 F.2d 1037 (6th Cir. 1970) 8
United States v. Cummins, 425 F.2d 646 (8th Cir. 1970) 8
United States v. Fisher, 442 F.2d 109 (7th Cir. 1971) 8
United States v. Haughton, 413 F.2d 736 (9th Cir. 1969) 12
United States v. Noyd, 18 USCMA 483, 40 CMR 195 (1969) 8
United States v. Owen, 415 F.2d 383 (8th Cir. 1969) 8, 12
United States v. Thompson, 431 F.2d 1265 (3rd Cir. 1970) 8

Page

United States ex rel. Donham v. Resor, 436 F.2d 751 (2nd Cir. 1971) 12, 13

United States ex rel. Tobias v. Laird, 413 F.2d 936 (4th Cir. 1969) 12, 13

OTHER AUTHORITIES:

Air Force Regulation 35-24 ..... 6, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

WILLIAM BATES COLE, JR., *Petitioner,*

v.

WILLIAM T. CLEMENTS, JR., et al., *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner William Bates Cole, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 6, 1974.

OPINION BELOW

The opinions of the Court of Appeals, the District Court for the District of Colorado, and the findings of the Air Force, not reported, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 6, 1974. A timely Petition for Rehearing *en banc* was denied on May 13, 1974. A Motion for Enlargement of Time to File Writ of Cer-

tiorari was granted by Mr. Justice White on July 26, 1974 and as required, this Petition is filed before September 10, 1974. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 and under the provisions of Article I, Sections 8 and 9 of the United States Constitution.

QUESTIONS PRESENTED

1. Whether a conscientious objector applicant is guaranteed by the provisions of the Due Process clause of the Fifth Amendment a right to review and rebut an adverse report prepared by the Staff Judge Advocate determining the legal sufficiency of the claim.

2. Whether the Court of Appeals correctly found a "basis-in-fact" for the denial by the Air Force of Petitioner's application for discharge as a conscientious objector on grounds of insincerity where all those persons who interviewed and had personal contact with the applicant judged him sincere.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

> Fifth Amendment. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Air Force Regulation 35-24

Paragraph 13. Action at Decision Level. A final decision based on the entire record will be made by the Secretary of the Air Force (officers) and HQ USAF (airmen). Any additional information other than the official service record of the applicant considered by the Secretary of the Air Force or HQ USAF which is adverse to the applicant, and which the applicant has not had an opportunity to comment upon or refute, will be made a part of the record and the applicant will be given a 15 day opportunity from date of receipt of the additional information to comment upon or refute the material before a final decision is made. The reasons for an adverse decision will be made a part of the record and will be provided to the individual.

STATEMENT OF THE CASE

Petitioner voluntarily enlisted in the United States Air Force Reserve on April 21, 1972. (Supplemental Appellate Record, Vol. I, hereinafter "SR", p. 43.) and began a four year tour of duty in June, 1972 (SR 37). He completed basic training at Lackland Air Force Base, Texas, in August, 1972. Petitioner was then ordered to Lowry Technical Training Center, Lowry Air Force Base, Colorado for training as a bomb navigation system mechanic. During this course of training Petitioner first became aware of conflicts between his duties and his developing beliefs. A point came when Petitioner realized

he could not reasonably assume that the planes on which he was working would be exempt from combat (SR 19-20). This realization, its ramifications and its impact upon Petitioner struck him with such force that he began to question his ability to perform his duties. Upon immediately bringing this to the attention of his instructor, Petitioner was taken out of his training course and instructed to take time to think about his convictions and beliefs (SR 19-20). It was through this period of introspection and soul-searching that Petitioner's beliefs crystallized into the deep convictions of a conscientious objector (SR 19-20). In accordance with Air Force Regulation 35-24 Petitioner submitted his written application for discharge on December 19, 1972 (SR 23).

Following the submission of his written application, Petitioner was interviewed by a psychiatrist, a chaplain on three occasions, his commanding officer and an investigating officer. In summation, these officers found that Petitioner was a sincere conscientious objector (SR 33), that his convictions were rooted in his early religious training and experience (SR 34), and that he should be discharged as a conscientious objector (SR 6). After hearings on February 1, 2 and 6, 1973, the Investigating Officer concluded:

> Although I did not *personally* believe there could be a truly conscientious objector, this investigation has led me to believe otherwise. I truly believe that Airman Cole is sincere in his beliefs. (SR 14)

It was only at this point that Petitioner was given an opportunity to submit rebuttal to the documents included in his file as of that date. Because the file contained only positive findings, Petitioner made no rebuttal (SR 12).

The file was then forwarded to the office of the Staff Judge Advocate at Lowry Air Force Base, Colorado for the standard review of procedural sufficiency. After reviewing the file, and without consultation with any of the participants in the evaluative process, the Staff Judge Advocate opined that Petitioner's request should be denied. Although noting the strongly positive reports from all those who spoke directly with Petitioner, he based his recommendation on the following analysis:

> . . . His willingness to work on an aircraft carrying nuclear weapons is incompatible with a belief in opposition to all wars; certainly it is an unreasonable belief to think that nuclear weapons are not for the purpose of waging war. It seems that Airman Cole's wife was very influential in his decision to request discharge as a CO and that this may have been more important than his stated moral convictions. He states he attends church occasionally; that he tried to quit smoking and *in the future* would like to become a vegetarian. These action are not consistent, as deeply held moral beliefs would require a way of life consistent with one's stated beliefs (SR 11). (Emphasis in original.)

The Staff Judge Advocate concluded, based upon conjecture and surmise, that the Petitioner was, as a matter of law, not a conscientious objector (SR 11).

Although a copy of this review was never provided to the Petitioner to enable rebuttal or clarification, it was forwarded up the chain of command. Based upon this recommendation Petitioner's request was denied at every level (SR 2-5). Petitioner finally received a letter denying

his application dated May 23, 1973 (SR 2). He then filed a Petition for Writ of Habeas Corpus in the District Court for the District of Colorado, pursuant to 28 U.S.C., Sections 2241 and 2242, on June 7, 1973 requesting, *inter alia*, that the Court order Respondents to honorably discharge him from the Air Force (Appellate Record, Vol I, hereinafter "R", p. 1). This Petition was denied on August 21, 1973 (R 37). Petitioner then filed a Notice of Appeal with the Court of Appeals for the Tenth Circuit. The case was submitted on briefs, and an opinion affirming the lower court's ruling was entered on March 6, 1974, a copy of which is appended hereto. A Petition for Rehearing with a Suggestion for Rehearing *en banc* was denied by the Court of Appeals on May 13, 1974.

REASONS FOR GRANTING THE WRIT

1. INTERPRETATION OF AIR FORCE REGULATION 35-24 BY THE COURT OF APPEALS TO DENY PETITIONER A COPY OF AN ADVERSE REPORT CONSTITUTES A DENIAL OF DUE PROCESS AND CREATES A CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND PRIOR DECISIONS OF THIS COURT.

The recommendation and review of the Staff Judge Advocate, the contents of which constituted the alleged basis for this denial of Petitioner's claim, was never afforded to him for rebuttal or comment. Air Force Regulation 35-24, paragraph 13 provides in its entirety:

> 13. Action at Decision Level. A final decision based on the entire record will be made by the Secretary

> of the Air Force (officers) and HQ USAF (airmen). Any additional information other than the official service record of the applicant considered by the Secretary of the Air Force or HQ USAF which is adverse to the applicant, and which the applicant has not had an opportunity to comment upon or refute, will be made a part of the record and the applicant will be given a 15 day opportunity from date of receipt of the additional information to comment upon or refute the material before a final decision is made. The reasons for an adverse decision will be made a part of the record and will be provided to the individual.

The Court of Appeals held that the regulation requires only that new *factual* information which is adverse to the applicant be afforded to him. Petitioner submits that this interpretation of AFR 35-24 constitutes a denial of Due Process as defined by this Court's prior decisions and a substantial number of sister Courts of Appeals.

As this Court has previously held, the refusal to disclose adverse information is not an incidental infringement of technical rights but is an important requirement of a fair hearing, a fundamental safeguard afforded by traditional notions of Due Process. *Simmons v U.S.*, 348 U.S. 397 (1955). This Court, and numerous Courts of Appeals, have faced the issue presented here as applied to selective service procedures for evaluation of registrants for classification as conscientious objectors. Uniformly the decisions have required that applicants be informed of the facts presented to the Appeal Board as well as the arguments and overall position of the Department of Justice. *Gonzales v. U.S.*, 348 U.S. 407 (1955);

U.S. v. Fisher, 442 F.2d 109 (7th Cir. 1971); *U.S. v. Thompson*, 431 F.2d 1265 (3rd Cir. 1970); *U.S. v. Cabbage*, 430 F.2d 1037 (6th Cir. 1970); *U.S. v. Cummins*, 425 F.2d 646 (8th Cir. 1970); *U.S. v. Owen*, 415 F.2d 383 (8th Cir. 1969); *Chernekoff v. U.S.*, 219 F.2d 721 (9th Cir. 1955). Fewer courts have had the opportunity to apply this proposition to standards as applied to in-service administrative procedures.

The United States Court of Military Appeals in *United States v. Noyd*, 18 USCMA 483, 40 CMR 195 (1969), has held that because the in-service conscientious objector application is forwarded to the Secretary of the service concerned through the applicant's chain of command and the regulation does not confine the intermediate commander to the information contained in the application, it is possible that a recommendation may be based on new information. "Fairness of procedure would indicate that, at least before the final decision by the Secretary, the applicant be apprised of unfavorable information not previously known to him and be accorded the opportunity to file rebuttal or explanation of the adverse matters." 40 CMR 195, 206.

Consistent with the Court of Military Appeals, in the cases of *Friedberg v. Resor*, 343 F.2d 935 (2nd Cir. 1971) and *Crotty v. Kelly*, 443 F.2d 214 (1st Cir. 1971), both Circuit Courts required that the applicant be afforded access to all documents which are forwarded to the Review Board and an opportunity to reply. Yet in the case of *O'Mara v. Zebrowski*, 447 F.2d 1085 (3rd Cir. 1971), as in the instant case, the Court of Appeals held that due process did not require that the serviceman be afforded a copy of an adverse recommendation accom-

panying his appeal. Clearly a conflict among the Courts of Appeals exists, and it is imperative that this Court delineate the specific standards required by the due process clause of the Fifth Amendment.

More significantly, this Court must not allow the decision below to stand without further definition less the strength and spirit of its prior decisions in *Simmons v. U.S.*, 348 U.S. 397 (1955) and *Gonzales v. U.S.*, 348 U.S. 407 (1955) be eroded. Noting that the Appeal Board in *Gonzales, supra*, as in the instant case, is the only decision making body to pass on the entire file, this Court held:

> An opportunity for the registrant to reply is therefore the only means of insuring that this Board will have *all* the relevant data. Furthermore, if the registrant is to present his case effectively to the Appeal Board he must be cognizant of all the facts before the Board as well as the over-all position of the Department of Justice . . . .
>
> The petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contention . . . .
>
> Just as the right to a hearing means the right to a meaningful hearing . . . (Citations ommitted) so the right to file a statement before the Appeal Board includes the right to file a meaningful statement, one based on all the facts in the file and made with the awareness of the recommendations and arguments to be countered. (Emphasis in original). *Gonzales v. U.S.*, 348 U.S. 407, 413-415.

This Court would have had the occasion to define the

necessary standards of Due Process in the case of *McGarva v. U.S.*, 406 U.S. 953 (1972), Petition for Writ of Certiorari granted, which again raised these issues with respect to the Selective Service System. The Solicitor General in that case confessed error, depriving the Court of that opportunity. The instant case again offers the Court this opportunity to more clearly define the Due Process standards and determine the extent to which they apply to in-service conscientious objector administrative procedures.

In the case of *Crotty v. Kelly*, 443 F.2d 214 (1st Cir. 1971) the Court held this Court's decision in *Gonzales v. U.S., supra* to be applicable to in-service claims, finding that Gonzales was not based upon the intricacies of particular regulations but upon underlying concepts of procedural regularity and fair play. This Court must seize this occasion to not only further delineate Due Process standards required by its decision in *Gonzales*, but to apply these standards to in-service administrative procedures. Allowing this decision to stand will afford conscientious objector claimants in the military procedures which are subject to less stringent Due Process standards than required for pre-induction claimants. This is an issue of constitutional magnitude not yet determined by this Court. See *Ehlert v. U.S.*, 402 U.S. 99 (1971).

2. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE "BASIS-IN-FACT" STANDARD IN UPHOLDING THE AIR FORCE'S DENIAL OF THE PETITIONER'S APPLICATION FOR DISCHARGE AS A CONSCIENTIOUS OBJECTOR.

The Court of Appeals for the Tenth Circuit concluded that the Air Force had a "basis-in-fact" in denying the Petitioner's application for discharge as a conscientious objector. The Court thereby affirmed the conclusion of the Air Force that the Petitioner's beliefs were not "deeply and sincerely held." The apparent basis for this finding was that Petitioner's beliefs were only "transitory in nature" and "more a passing result of his wife's influence, rather than being the result of any fundamental and permanent change in his own thinking." (Slip Opinion, page 11.)

It is only after an applicant has presented a *prima facie* case that the burden shifts to the Air Force to show the Petitioner should not have been granted conscientious objector status. *Smith v. Laird,* 486 F.2d 307 (10th Cir., 1973). By inference then, the Court of Appeals must have found that the Petitioner had presented such a case.

But it is the contention of the Petitioner that the Tenth Circuit Court of Appeals erred in its interpretation of the "basis-in-fact" standard and its application in this case. More importantly, the Court's decision has created a split in the circuits in finding a "basis-in-fact" for the denial of Petitioner's conscientious objector claim where all those persons who had personal contact with the

applicant found that he was sincere in his beliefs and recommended discharge.

It is well established that mere disbelief or surmise will not rise to a "basis-in-fact" to justify a denial of an application for discharge by a military service member. Rather, there is needed hard, provable facts. *Dickinson v. United States*, 346 U.S. 389 (1953); *Smith v. Laird, supra; Helwick v. Laird*, 438 F. 2d 959 (5th Cir. 1971); *Rothfuss v. Resor*, 443 F.2d 554 (5th Cir. 1971); *Bates v. Commander*, 417 F.2d 475 (1st Cir. 1969); *Kessler v. United States*, 406 F.2d 151 (5th Cir. 1969). Nor will suspicions suffice as a basis-in-fact. *Dickinson v. United States, supra; United States v. Owen*, 415 F.2d 383 (8th Cir. 1969); *United States v. Haughton*, 413 F.2d 736 (9th Cir. 1969). Although the Tenth Circuit Court of Appeals cites approvingly *Smith v. Laird, supra*, it goes on to raise suspicion, surmise and disbelief, with no hard provable facts, to a "basis-in-fact".

More significantly, the Tenth Circuit Court of Appeals has created a split in the circuits over a second issue regarding "basis-in-fact". Numerous Courts of Appeal have held that *great weight* must be given to the findings of those persons who had personal contact and interviewed an applicant for discharge. *Rastin v. Laird*, 445 F.2d 645 (9th Cir. 1971); *United States ex rel. Donham v. Resor*, 436 F.2d 751 (2nd Cir. 1971); *United States ex rel. Tobias v. Laird*, 413 F.2d 936 (4th Cir. 1969). There is no substitute for personal contact with an applicant. See for example, *Bohnert v. Faulkner*, 438 F.2d 747 (6th Cir. 1971); *United States v. Abbot*, 425 F.2d 910 (8th Cir. 1970). Thus, no basis-in-fact can be found to exist for an assertion by the service branch that a person is insincere

in his beliefs where all those persons who have interviewed the applicant and have had personal contact with him state that he is sincere in his beliefs. *United States ex rel. Tobias v. Laird, supra; United States ex rel. Donham v. Resor, supra.*

In this case, all those persons who had personal contact with the applicant and interviewed him reported that he was sincere in his belief that he could not participate in war in any form. Nonetheless, the Tenth Circuit Court of Appeals gives no weight whatever to those individuals who so reported.

In opposition to the requirements outlined by all other circuits facing this issue, the Tenth Circuit Court has given no weight whatever to those persons who interviewed the applicant and had personal contact with him. As a matter of law, there is no basis-in-fact to justify the findings of the Air Force that the Petitioner's beliefs were not deeply and sincerely held.

The Court of Appeals further erred in supporting the Air Force's finding of insincerity since the Air Force relied upon illegal grounds. *Sicurella v. United States,* 348 U.S. 385 (1954); *Clay v. United States,* 403 U.S. 698 (1971). Each of the grounds put forth by the Staff Judge Advocate and relied upon by the Air Force were considered and found illegal in *Ptak v. Laird,* 335 F. Supp. 727 (D. Colo. 1971), a case not appealed by the government. Additionally, see as to a wife's influence, *Cohen v. Laird,* 315 F. Supp. 1265 (D.S.C. 1970) and *Emerson v. McKean* 322 F. Supp. 231 (D.Ark. 1971); timing of application, *Dickinson v. United States, supra; Bohnert v. Faulkner, supra; United States v. Abbot, supra; Bates v. Commander,*

supra; Goodwin v. Laird, 317 F. Supp. 863 (N.D.Cal. 1970) and *Bouthillette v. Commanding Officer*, 318 F. Supp. 1143 (D.R.I. 1970); reasonableness of the applicant's concept of use of weapons, *Ptak v. Laird, supra.*

CONCLUSION

For these reasons, a Writ of Certiorari should issue to the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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September 1, 1974

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 73-1724

WILLIAM BATES COLE, JR.,
Petitioner-Appellant,
v.
WILLIAM T. CLEMENTS, JR., et al,
Respondents-Appellees.

Appeal from the United States District Court for the District of Colorado (D.C. No. C-5072)

Submitted on the briefs: February 2, 1974

W. Robert Montgomery and Willard B. Hardesty, for Petitioner-Appellant.

James L. Treece, United States Attorney, and of Counsel, Lt. Col. Wayne E. Robinson, Office of Staff Judge Advocate, Lowry AFB, Colorado, for Respondents-Appellees.

Before LEWIS, Chief Judge, and SETH and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

Airman First Class William Bates Cole, Jr., assigned to Lowry Air Force Base, Denver, Colorado, made application for discharge as a conscientious objector from the Regular United States Air Force. This application was ultimately denied by the Air Force, whereupon Cole instituted habeas corpus proceedings in the United States District Court for the District of Colorado. The named respondents filed their answer to Cole's petition, and

the matter was then tried upon the record as thus made. At the conclusion of the hearing on this matter, the trial court found that the procedure followed by the Air Force met the requirements of Air Force regulations 35-24 and that Cole had accordingly been afforded due process. Additionally, the trial court found from the record before it that there was a basis in fact for the denial of Cole's application and accordingly denied the petition. Cole now appeals. We affirm.

Before considering the applicable Air Force regulations, reference should first be made to the chronology of proceedings. Cole enlisted in the Regular Air Force on June 21, 1972, for a period of four years' active duty. Upon completion of his basic training at Lackland Air Force Base, Cole was transferred on August 16, 1972, to Lowry Air Force Base at Denver, Colorado, for training as a bomb-navigation systems mechanic. On or about January 23, 1973, Cole formally submitted his application for discharge as a conscientious objector. In connection with his application for discharge, Cole was interviewed and evaluated by a chaplain, a psychiatrist and a hearings or investigative officer, each of whom made a written report which was made a part of Cole's official file. The chaplain, incidentally, believed Cole to be sincere in his beliefs; the psychiatrist recommended that "serious consideration" be given Cole's application, and the investigative officer thought Cole to be sincere and recommended approval of his application for discharge.

It was at this point that the file as thus made was given Cole in accord with the provisions of regulation 35-24, paragraph 11f. That particular paragraph provides that a copy of the record shall be given the applicant and

further provides that the applicant may submit a rebuttal to any and all material in the file, including the investigative officer's report. Cole responded in writing that he did not desire to file a rebuttal.

Thereafter, Cole's commanding officer, a Captain Farrell, also recommended approval of Cole's application for discharge. As has been above indicated, up to this time Cole's application appeared to be proceeding quite smoothly, from his standpoint at least. From that point on, however, matters took a turn for the worse.

It was at this juncture that the matter, pursuant to regulation 35-24, paragraph 12, was referred to the Staff Judge Advocate at Lowry Air Force Base for review. The Staff Judge Advocate reviewed the file as thus made, taking no "new" evidence of any kind, and made a recommendation that the application be denied. The basis of this recommendation was in essence that Cole had failed to sustain his burden of proving that his application for discharge as a conscientious objector was founded on deeply and sincerely held beliefs. The foregoing was but the gist of the recommendation, which was detailed in considerable particularity.

The Staff Judge Advocate's recommendation, along with Cole's file, was then forwarded to the Commander of the Lowry Technical Training Center. Cole, however, was not given a copy of the negative recommendation made by the Staff Judge Advocate, and counsel argues here, as he did in the trial court, that the failure to give Cole a copy of the recommendation of the Staff Judge Advocate denied him an opportunity to file a rebuttal thereto, and was not in compliance with the provisions of regulation 35-24, paragraph 13.

Without going into further detail, the Commander of the Lowry Technical Training Center recommended disapproval of Cole's application. Thereafter, Cole's application proceeded upward in the chain of command with several additional recommendations of disapproval, until the application was finally and formally denied by the Air Force HQ. This petition for habeas corpus then followed the final denial of Cole's application.

In this court, Cole presents essentially two questions: (1) Was Cole entitled, under the provisions of regulation 35-24, paragraph 13, to receive a copy of the negative recommendation of the Staff Judge Advocate and to have fifteen days thereafter to comment on or refute such recommendation, and did such failure of the Air Force to comply with the regulation constitute a violation of procedural due process; and (2) is there a basis in fact for the denial of the application for discharge? In our view, there was compliance with the regulations here involved, and there was a basis in fact for the denial of Cole's application for discharge. It is on these grounds that we affirm.

Paragraph 11f of regulation 35-24 provides that the investigating officer's report and recommendation, along with the individual's application, all interviews with chaplains or doctors, and any other item submitted by the applicant in support of his case shall constitute the "record" and that a copy of this record shall be furnished the applicant at the time the record is forwarded to the commander who had appointed the investigating officer. Under the provisions of this particular paragraph, the applicant then has fifteen days within which to submit a "rebuttal" to such report. As indicated, Cole was

furnished such report, and in connection therewith indicated that he did not desire to file a rebuttal. So, there was full compliance with paragraph 11f.

Paragraph 12 goes on to provide that fifteen days after a copy of the aforesaid report has been furnished the applicant, or upon receipt of his rebuttal thereto, whichever is sooner, the record is to be forwarded to the local Staff Judge Advocate for legal review and that when the record is complete it will in turn be forwarded to the commander who appointed the investigating officer. Following through, then, the commander in turn forwards the record with his recommendation, and reasons, "through each level in the chain of command," with recommendations being attached "at each level."

Paragraph 13 is the particular paragraph with which we are here concerned and it reads in its entirety as follows:

> 13. Action at Decision Level. A final decision based on the entire record will be made by the Secretary of the Air Force (officers) and HQ USAF (airmen). Any additional information other than the official service record of the applicant considered by the Secretary of the Air Force or HQ USAF which is adverse to the applicant, and which the applicant has not had an opportunity to comment upon or refute, will be made a part of the record and the applicant will be given a 15 day opportunity from date of receipt of the additional information to comment upon or refute the material before a final decision is made. The reasons for an adverse decision will be made a part of the record and will be provided to the individual.

In ruling that the Air Force had complied with its regulations, and more particularly paragraph 13, the trial court made the following pertinent comment:

> The petitioner's argument of the first issue is that under the dictates of Air Force Regulation 35-24, paragraph 13, he is to be given an opportunity to rebut all reports and recommendations included in the conscientious objector file. The government argues that the regulation is not to be construed so broadly and that the Air Force has properly interpreted and complied with the regulation by giving the airman an opportunity to examine and comment on all factual material in the file. The factual input was complete when given to the petitioner. The controversy centers on the subsequent adverse ercommndations added by the command level reviewers. The relevant part of the regulation reads "Any additional *information* . . . which is adverse to the applicant . . . ." The last sentence of the regulation provides "The reasons for an adverse decision will be made a part of the record and will be provided to the individual." This difference in semantics demonstrates that the choice of terms is not accidental. *Information* is certainly different from *reasons*, and therefore the Court finds that the petitioner should be and was afforded an opportunity to rebut any *factual matter* in the file but does not have the right to comment on and rebut the reasoning giving rise to each conclusion made at various levels of command. The Court finds that the Air Force has complied with its own regulations in processing the applicant's file; that these regulations comport with due process and that therefore the requirements for due process have been met. *In re*

Kanewske, 260 F.Supp. 521, 524 (N.D.Calif. 1966); *Minasian v. Eagle*, 292 F.Supp. 543 (C.D.Calif. 1967) aff'd. 400 F.2d 137 (9th Cir. 1967). (Emphasis by the trial court).

We generally agree with the trial court's analysis of this matter. In our view, Gonzales v. United States, 348 U.S. 407 (1955), and Crotty v. Kelly, 443 F.2d 214 (1st Cir. 1971), relied on by counsel, are not really in point. *Gonzales* was concerned with the failure to give the would-be conscientious objector a copy of a report and recommendation made by an investigative body charged with checking into and generally making an investigation of the entire matter. In *Gonzales*, the Supreme Court held that the particular military regulations there under consideration implicitly required that the registrant be supplied with "adverse evidence" and the adverse recommendation based thereon. So, *Gonzales* was concerned with an investigative report and recommendation upon which the final decision was, in part, based. Here, we are concerned with a recommendation made in the course of the decisional process, and not as a part of any further and additional investigative efforts. In the instant case, the recommendation of the local Staff Judge Advocate was made on the record as theretofore compiled, with no further factual matter being added to the file. We deem the report under consideration in *Gonzales* to be akin to the report and recommendation made in the instant case by the investigating officer, a copy of which was given Cole, and to which he had the opportunity to respond.

Nor do we believe that *Crotty* suggests a different result. In *Crotty*, the applicant was not given a copy of the chaplain's report, the psychiatrist's report, or the

hearing officer's report, each of which, in the instant case, was furnished Cole and to which he was given opportunity to respond. All of which suggests the inapplicability of *Crotty* to the present case. In sum, then, we conclude, as did the trial court, that there was substantial compliance by the Air Force with its regulations and that there was no violation of due process.

The other matter here urged is that there was no basis in fact for the denial by the Air Force of Cole's application for discharge. Our study of the record convinces us that there was. In this general connection we recognize that our scope of review is a very narrow one. Smith v. Laird, 486 F.2d 307 (10th Cir. 1973). The scope of judicial review in a case of this kind has indeed been characterized as being "the narrowest known to the law." Bishop v. United States, 412 F.2d 1064 (9th Cir. 1969). It is not within our province to draw the inferences, nor are we of course permitted to simply substitute our best judgment on the matter for that of the Air Force. At the same time, we have stated that once the applicant makes a prima facie case for classification as a conscientious objector, the Government must either show some "hard, reliable, provable facts" which would provide a basis for disbelieving applicant's sincerity, or, it must show "something concrete in the record which substantially blurs the picture painted by the applicant." Smith v. Laird, *supra*. With these general principles in mind, let us examine Cole's file.

It is apparent that the basis for the denial of Cole's application was that his claim for conscientious objector status was not founded on deeply and sincerely held beliefs. As indicated, Cole voluntarily enlisted in the

Regular Air Force for a four-year period of duty, and, at the time of his enlistment, Cole indicated that he was not a conscientious objector. Cole had been recently married, and certainly one reason for his enlistment was his desire to earn a livelihood. As a condition of his enlistment, Cole requested, and his request was honored, that he be trained as a bomb-navigation systems mechanic and he was accordingly assigned to Lowry Air Force Base for such training. It was Cole's contention that he became a conscientious objector to all war while in the course of such training.

According to Cole, the "incident" that triggered his change of heart was when he realized that he was learning to equip aircraft with conventional weapons, and not just nuclear weapons. In this regard, Cole stated that he had not objected to equipping aircraft with nuclear weapons, because in his own mind he doubted that nuclear bombs would ever be dropped, but that he could not bring himself to placing conventional weapons on aircraft, knowing that such might some day be put in actual use. The Air Force attached significance to this attempted distinction on the part of Cole and felt that it was not truly indicative of an across-the-board objection to war. Certainly such is a permissible inference and, in our view, does tend to "blur" Cole's present declaration that he is now opposed to war in all forms.

Cole's avowed present objection to war is not, as such, religiously motivated, which, of course, it need not necessarily be. Welsh v. United States, 398 U.S. 333 (1970), and United States v. Seeger, 380 U.S. 163 (1965). But if his objections be not religiously oriented, Cole must then demonstrate that his beliefs are held with the strength

of traditional religious convictions. This burden the Air Force held Cole had not met. And in our view the record, and the permissible inferences that may be drawn therefrom, support such conclusion. In this general connection, the Air Force indicated that Cole's avowed present aversion to war was not deeply and sincerely held, but was only transitory in nature, and was more a passing result of his wife's influence, rather than being the result of any fundamental and permanent change in his own thinking. Overall, then, we conclude that the action of the Air Force finds a basis in fact in the record.

Judgment affirmed.

MAY TERM — MAY 13, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges.

IN THE MATTER OF THE APPLICATION OF AIRMAN FIRST CLASS WILLIAM BATES COLE, JR.,
Petitioner-Appellant,

v.

WILLIAM T. CLEMENTS, JR., Acting Secretary of Defense, et al.,
Respondents-Appellees.

No. 73-1724

This matter comes on for consideration of the petition for rehearing and suggestion for rehearing en banc filed by the petitioner in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Lewis, Seth and McWilliams to whom the matter was submitted.

The petition for rehearing having been denied by the original panel to whom the matter was submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

IN THE MATTER OF THE APPLICATION OF AIRMAN FIRST CLASS WILLIAM BATES COLE, JR.,
Petitioner,

vs.

WILLIAM T. CLEMENTS, JR., et al,
Respondents.

C-5072

ORDER

This matter is before the Court on a petition for a Writ of Habeas Corpus filed by Airman First Class William Bates Cole. The petitioner alleges that he is presently illegally restrained of his liberty in the United States Air Force by the respondents. The government filed a response to the petition. The petitioner replied in a memorandum brief and the government filed a reply brief. There are three issues to be resolved as stated by the petitioner.

1. Did the oportunity afforded the petitioner for rebuttal satisfy the requirements of pertinent Air Force regulations and afford him due process of law as guaranteed by the United States Constitution?

2. Did the petitioner sustain his burden of presenting a prima facie case of conscientious objection on his part to the United States Air Force?

3. Does there exist a basis in fact for denying petitioner a discharge from the United States Air Force pursuant to its regulations as a conscientious objector?

The petitioner's argument of the first issue is that under the dictates of Air Force Regulation 35-24, para-

graph 13, he is to be given an opportunity to rebut all reports and recommendations included in the conscientious objector file. The government argues that the regulation is not to be construed so broadly and that the Air Force has properly interpreted and complied with the regulation by giving the airman an opportunity to examine and comment on all factual material in the file. The factual input was complete when given to the petitioner. The controversy centers on the subsequent adverse recommendations added by the command level reviewers. The relevant part of the regulation reads "Any additional *information* . . . which is adverse to the applicant . . . ." The last sentence of the regulation provides "The reasons for an adverse decision will be made a part of the record and will be provided to the individual." This difference in semantics demonstrates that the choice of terms is not accidental. *Information* is certainly different from *reasons,* and therefore the Court finds that the petitioner should be and was afforded an opportunity to rebut any *factual matter* in the file but does not have the right to comment on and rebut the reasoning giving rise to each conclusion made at various levels of command. The Court finds that the Air Force has complied with its own regulations in processing the applicant's file; that these regulations comport with due process and that therefore the requirements for due process have been met. *In re Kanewshe,* 260 F. Supp. 521, 524 (N.D. Calif. 1966); *Minasian v. Eagle,* 292 F. Supp. 543 (C.D. Calif. 1967) aff'd. 400 F.2d 137 (9th Cir. 1967).

The second issue in this case is closely connected with the third issue and it may be fair to state that they are to some degree intertwined. The Court considers the question somewhat differently from its formulation by

the petitioner. The question of whether the petitioner presented a prima facie case has already been resolved in the negative by the Secretary of the Air Force, by exercise of his discretion. The Court's review is narrowly limited to ascertaining whether there is any basis in fact for the finding of the Secretary. *Helwick v. Laird* 438 F. 2d 959 (5th Cir. 1971). The record in this case reflects that the issue of sincerity was resolved against the petitioner on the basis of the facts presented. The criteria on review is not whether the Court could reach a different conclusion than the Secretary, or if there were inconsistent facts which were not completely resolved, but whether there is indeed a basis for the Secretary's decision. The petitioner has not shown that thre was no basis in fact, but has merely argued a different interpretation of these facts. This is plainly not sufficient to entitle him to relief.

The Petition for Writ of Habeas Corpus is denied.

Dated at Denver, Colorado, this 21st day of August, 1973.

FRED W. WINNER
United States District Judge

DECISION OF THE AIR FORCE CHIEF OF STAFF

DPMAKE 23 May 1973

Classification as a Conscientious Objector — Amn William B. Cole, FR 263-08-2677.

Lowry Tech Tng Cen/DPMQS

1. Application for classification as a conscientious objector submitted by Airman Cole is disapproved. The application does not contain sufficient proof to establish his claim.

2. Airman Cole has failed to substantiate that he was opposed to all wars, or that his beliefs were so deeply held as to allow no rest or peace if he remains a member of the Air Force. In this regard, he has failed to provide information that would serve to establish when, where, how and who or what caused his beliefs, or to demonstrate a belief in opposition to all wars so deeply held as to be a primary controlling force in his life.

3. The application has been retained for file in airman's master personnel records.

FOR THE CHIEF OF STAFF

DENNIS R. MILLER, Captain, USAF
Directorate of Pers Program Actions

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

WILLIAM BATES COLE, JR., Petitioner

v.

WILLIAM T. CLEMENTS, JR., et al., Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 1974, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Honorable Robert H. Bork
Solicitor General of the United States

James Treece, Esquire
U.S. Attorney
U.S. Courthouse
19th and Stout Streets
Denver, Colorado 80202

Lt. Col. Wayne E. Robinson
Office of the Staff Judge Advocate
Lowry Air Force Base
Denver, Colorado

Clerk, United States Court of Appeals
for the Tenth Circuit

I further certify that all parties required to be served have been served.

/s/ RUDOLPH SCHWARE
5701 East Evans Avenue
Denver, Colorado
Attorney for Petitioner-Appellant

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-250

WILLIAM BATES COLE, JR., PETITIONER

v.

JAMES R. SCHLESINGER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends (1) that he was denied due process because the Air Force did not allow him to review and rebut the Staff Judge Advocate's adverse recommendation on his application for discharge as a conscientious objector, and (2) that the denial of his application had no "basis in fact."

Petitioner filed a petition for a writ of *habeas corpus*, seeking a discharge from the Air Force, in the United States District Court for the District of Colorado. The district court denied the petition (Pet. App. 26-28), and the court of appeals affirmed (Pet. App. 15-24).

Petitioner enlisted in the Air Force on June 21, 1972, for a period of four years' active duty. On January 23, 1973, while training as a bomb-navigation systems mechanic, petitioner submitted his application for discharge, claiming that he was a conscientious objector.

Petitioner stated that he was "a totally nonviolent person who does not believe in physically harming another human being under any circumstances * * * even in self defense" (S.R. 18).[1] While he acknowledged that his beliefs were "based on moral rather than religious convictions" (*ibid.*), he stated that "[t]he core of all my beliefs come [sic] from Jesus Christ and His creed of 'always turning the other cheek'" (S.R. 19). He said that idea had been conveyed to him by his wife over a year earlier and had crystallized when he discovered he was working on aircraft that "dropped conventional weapons" rather than nuclear bombs, since he believed that the latter would never be used (*ibid.*).

Petitioner was interviewed by a chaplain, a psychiatrist, and a hearing officer, all of whom reported that they believed petitioner to be sincere in his beliefs. Petitioner was then given his record, which contained the reports of these officers. In accordance with Air Force Regulation 35-24, para. 11f, he was given the right to submit a rebuttal; he responded that he did not wish to do so.

The record was then sent to the Staff Judge Advocate for legal review. The Staff Judge Advocate reviewed the record and determined that petitioner's beliefs were not "deeply held" (S.R. 11). He based this determination on petitioner's actions, which were judged to be inconsistent with his professed beliefs. The Staff Judge Advocate noted that petitioner's "willingness to work on an aircraft carrying nuclear weapons is incompatible with a belief in opposition to all wars; certainly, it is an unreasonable belief to think that nuclear weapons are not for the purpose of waging war" (*ibid.*). Following the

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[1] "S.R." refers to the Supplemental Record on Appeal.

Staff Judge Advocate's recommendation of disapproval, the record was transferred up the chain of command, with each level adopting the Staff Judge Advocate's analysis and recommending that the application be disapproved. On May 23, 1973, the Air Force denied petitioner's application.

1. Petitioner contends that he was denied due process because he was not allowed to review and rebut the Staff Judge Advocate's legal analysis and adverse recommendation on his application, prior to its submission for a determination by the final reviewing authority. This contention is without merit.

Air Force regulations provide that an applicant be allowed to review and rebut "any additional information * * * which is adverse to the applicant" considered at the decisional level of review (AFR 35-24, para. 13; Pet. 3). The court below correctly held that the term "information" in that regulation meant factual information and not opinions and recommendations, such as the Staff Judge Advocate's legal analysis of, and recommendation based on, previously established facts that petitioner had already had an opportunity to rebut (S.R. 12).

Petitioner was given an opportunity to review and rebut all of the factual information relied upon by the Air Force in considering his application. In addition he was provided, as required by regulation (S.R. 2; AFR 35-24, para. 13), with a statement of reasons for the denial of his application. Petitioner was thus apprised of all of the evidence and the basis of decision. Due process requires no more. The analysis of the evidence and recommendation by the various levels of review are merely agency staff work designed to assist the deciding authority. Due process no more requires their disclosure than it would the recommendation of a law clerk to a judge.

Neither this Court's opinions in *Gonzales* v. *United States*, 348 U.S. 407, and *Simmons* v. *United States*, 348 U.S. 397, nor the holding in *Crotty* v. *Kelly*, 443 F. 2d 214 (C.A. 1), conflict with the decision of the court below. *Simmons* held that a registrant was entitled to a fair resume of an FBI report prior to the hearing before the Selective Service Appeal Board, so that he could rebut any adverse evidence contained in the report. *Gonzales* held that a registrant was entitled to a copy of the Department of Justice's recommendation and an opportunity to submit a reply to the Appeal Board. Both cases were "concerned with the failure to give the would be conscientious objector a copy of a report and recommendation made by an investigative body charged with checking into and generally making an investigation of the entire matter" (Pet. App. 21). Likewise, *Crotty* v. *Kelly*, *supra*, concerned the failure to give a conscientious objector applicant an opportunity to review and rebut the reports of the investigating officers, *i.e.*, the chaplain, hearing officer, psychiatrist and commanding officer. By contrast, petitioner received the full results of the investigation prior to the denial of his application.

2. Petitioner also contends that there was no "basis in fact" for the denial of his application for conscientious objector discharge. However, as stated in the court of appeals opinion, upon which we rely, the Air Force could and did draw the permissible inference that petitioner was not sincerely opposed to war in all forms, as he claimed, from the fact that "he had not objected to equipping aircraft with nuclear weapons, because in his own mind he doubted that nuclear bombs would ever be dropped, but that he could not bring himself to placing conventional weapons on aircraft, knowing that such might some day be put in actual use" (Pet. App. 23). As the Air Force and the court below found, this attempt-

ed distinction is not consistent with an across-the-board objection to war. Additionally, the court below upheld the Air Force's finding that petitioner's decision to request a discharge was only transitory in nature, based more on his wife's influence than on deeply held moral convictions. Contrary to findings of the military in *Cohen* v. *Laird*, 315 F. Supp. 1265, 1278 (D. S.C.), and *Ptak* v. *Laird*, 335 F. Supp. 727, 730 (D. Col.), relied upon by petitioner, this finding was amply supported by facts in the record. Petitioner's application stated that his wife put the idea in his head (S.R. 19) and the chaplain stated that it was the influence of petitioner's wife and certain peers that brought him to his present position (S.R. 34). Thus, there was a basis in fact for the Air Force's finding.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[2]The cases relied on by petitioner do not support the proposition that the opinions of interviewing officers are conclusive on the issue of sincerity. In those cases, the courts pointed out that those officers found the applicants sincere, but they did not conclude that, therefore, the applicants could not be found insincere. Rather, they pointed out there were no facts in the record upon which the final reviewing authority could base a finding of insincerity. Here, there were such facts.